Filed 2/11/04 Marriage of Baum CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re the Marriage of ALAN and MONITA BAUM.	B166801
ALAN BAUM, Appellant, v. MONITA BAUM, Respondent.	(Los Angeles County Super. Ct. No. BD118205)

APPEAL from orders of the Superior Court of Los Angeles County, Joanne B. O'Donnell, Judge. Affirmed.

Bruce Adelstein for Appellant.

Ronald A. Litz for Respondent.

Plaintiff and appellant Alan Baum (Alan) appeals an order denying his motion to correct a previous order on the grounds of clerical error.[1] [2]

The essential issue presented is whether the record contains substantial evidence to support the trial court's decision rejecting Alan's claim of a clerical error in the underlying order.

The underlying order includes, at paragraph 14(e), a provision requiring Alan to pay his former spouse, respondent Monita Baum (Monita), "[a]s and for additional spousal support . . . 40% of any and all commissions, bonuses and percentages paid to [Alan] or on [his] behalf by his employer" (hereafter, the bonus provision). Alan contends the bonus provision was included in the order through clerical error.

However, the order on its face indicates that Alan, an attorney who was acting in propria persona, approved the order as to form before the trial court signed it. Further, the record reflects the issue of Alan's bonus income was addressed during the OSC proceedings to modify spousal support -- following the hearing on the OSC, Alan consulted a family law specialist and indicated he was not concerned about paying additional spousal support based on his bonus income because he was not generating enough business to be earning any bonuses. On this record, the trial court properly denied Alan's motion to "correct" the prior order.

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[1] As is customary in family law cases, we refer to the parties by their first names for purposes of clarity and not out of disrespect. (See *In re Marriage of Olsen* (1994) 24 Cal.App.4th 1702, 1704, fn. 1; *Askew v. Askew* (1994) 22 Cal.App.4th 942, 947, fn. 6.)

[2] The order is appealable as an order after final judgment. (Code Civ. Proc., § 904.1, subd. (a)(2).)

FACTUAL AND PROCEDURAL BACKGROUND

Following a 32-year marriage, judgment of dissolution was entered in 1994.

1. *The circumstances related to the underlying order*.

On June 30, 1998, Alan filed an order to show cause (OSC) to modify spousal support.

The matter was heard on August 11, 1998. At the hearing, Alan was present and was represented by Donald Zelinsky (Zelinsky), and Monita was present and represented by Joseph Taback (Taback). Taback's associate, Marci Taback-Chyten (Taback-Chyten), was also present for the proceedings, although she did not appear as the attorney of record.

There was discussion in chambers between the court and counsel, which was unreported. Later that afternoon, the matter proceeded in open court, at which time the trial court indicated its ruling and findings on the record and directed Taback to prepare an order after hearing. The trial court increased spousal support by about $100 per month, to $1,300 per month, and set a schedule for Alan to pay arrearages. The transcript of the hearing does not include any mention of bonuses.

On October 7, 1998, Alan, acting in propria persona, reviewed the order drafted by Taback and signed it, approving it "as to form." The order was three pages long, double spaced. The bonus provision awarding Monita 40 percent of Alan's bonus income was set forth in a discrete paragraph, paragraph 14(e).

On November 3, 1998, the trial court signed the order which had been drafted by Taback and approved by Alan.

2. *Alan's motion to correct the November 3, 1998 order.*

Four years later, on September 18, 2002, Monita's counsel wrote to Alan requesting an accounting of all income and bonuses in order to enable counsel to determine whether Alan was in compliance with the court order.

In response, on December 6, 2002, Alan filed the instant motion to "correct" the November 3, 1998 order nunc pro tunc on the ground of clerical error. Alan asserted the motion was timely because clerical error may be corrected at any time, and the clerical error herein "was not brought to [his] attention until over four years after the contested hearing on August 11, 1998, at which time [Monita], for the very first time, demanded payment of 40% of [his] bonuses and commissions." Alan did not file a declaration in support of his moving papers.

3. *Monita's opposition.*

Monita's counsel, Taback-Chyten, filed an opposing declaration disputing Alan's claim that the bonus provision in the order stemmed from a clerical error. Taback-Chyten stated in her declaration: "I never would have included language in an order after hearing which did not, with 100% accuracy, reflect that which the judge ordered. (It is my best educated guess that the language in question reflects an order made by [the trial court] in chambers.)" Taback-Chyten emphasized that Alan had presented only a partial record of the proceedings which took place on August 11, 1998.

Taback-Chyten also argued that Alan's position was "problematic in that the Order entered by this Court on November 3, 1998, which [Alan] seeks to set aside, was negotiated, reviewed and signed by [Alan] himself in 1998 – over four years ago! [Alan] was an attorney at the time he signed this Order. [Alan] was present at the hearing. As a lawyer, and interested party, it is highly doubtful and suspect that [he] would have signed an order which was not reflective of that which the Court ruled, either on the bench or in chambers. [¶] . . . [Alan] although represented by counsel at the hearing, became his own attorney, representing himself in this action once the hearing was concluded and prior to the entry of this Order. [Alan] was involved in all aspects of drafting, reviewing, and finally, executing the Order After Hearing which he now seeks to set aside. . . . . [Alan] was fully aware of that which he was signing. [Alan] had a copy of the court transcript at the time he signed the Order. *[He] even consulted new counsel before*

signing the Order wherein he discussed the bonus issue." (Italics added, original italics deleted.)

Exhibit "F" to Taback-Chyten's declaration was a memorandum which Alan faxed to attorney Bobette Fleishman on August 21, 1998, 10 days after the hearing on the underlying OSC. Fleishman is a family law specialist. In the memorandum, Alan stated, inter alia: "Dear Bobette, [¶] Let me start with what I believe the Court's order was. Since I was so stunned, I don't remember if the Court ordered $200 a month or $300 a month on the arrears and Taback still hasn't sent us the proposed order. . . . [¶] As we discussed, I do not intend to work the rest of my life just to pay support. I will be retiring at age 62, which is in June of 2001 or in 34 months. *As far as bonuses go, since I have to do over $433,000 per year to even get them, it is quite unlikely that [t]here will be any. Also, I still am not bringing many of my own cases so any bonuses in this area is speculation.* . . . I want a waiver of all support, as well as my having to carry her as a beneficiary on my life insurance for $250,000." (Italics added.)[3]

4. *Alan's reply papers*.

Alan filed a reply declaration stating he signed the order prepared by opposing counsel because he was not representing himself at the time "and assumed it was a mere formality that the document was sent to me. I assumed that Mr. Zelinsky, the attorney of record, had also been sent a copy for his approval but apparently that was not the case. I did not have a copy of the transcript at the time I signed the Order After Hearing approved as to form only. I was never involved in the drafting of nor did I engage in any negotiations regarding the Order After Hearing."

5. *Trial court's ruling.*

On February 26, 2003, the matter came on for hearing and taken under submission. Later, the trial court ruled: "The motion is denied. The Court is persuaded by the arguments presented in [Monita's] papers, including without limitation the

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[3] It appears the Fleishman memorandum came in without objection below.

following: [¶] [Alan] failed to file a declaration in support of his motion. His attorney's declaration states that [Alan] was unaware of paragraph 14(e) of the order until it was brought to his attention in November 2002. However, [Alan] signed the order, and he has submitted no declaration explaining why he, a lawyer himself, signed an order that contained a provision never ordered by the court and with which he strongly disagreed. His failure to support his motion with a declaration under penalty of perjury suggests disingenuousness on his part.

"The Court finds the error in question, if there was an error at all, which the court does not address, was not a clerical error. [Alan's] motion insinuates, although it does not directly state, that [Monita's] counsel improperly inserted paragraph 14(e) in the order. On the facts presented, if indeed paragraph 14(e) was not part of the Court's order at the time of hearing, its inclusion in the Order following hearing would be in the nature of fraud, not clerical error. The authorities cited by [Alan] . . . are not on point. In both cases, the errors alleged were errors of transcription—plainly clerical errors. In this case, the purported error is the inclusion of an entire paragraph that [Alan] claims the court never ordered. This Court cannot find that the error, if there was one at all, was clerical, particularly where [Alan] insinuates, but does not directly state, that the inclusion of paragraph 14(e) was an intentional, fraudulent action, and where [Alan] fails to support his motion with a declaration under penalty of perjury.

"The Court believes that [Alan's] motion was brought in bad faith. [Alan] failed to include a declaration, made thinly veiled allegations of wrongdoing against [Monita's] counsel, and then sought to save the motion by filing (one month after the filing of his reply papers) a declaration of [his] former counsel which again insinuates that [Monita's] counsel acted improperly. None of this supports the argument that the inclusion of paragraph 14(e) in the order was a clerical error. [Monita] is entitled to an award of attorney's fees for having to respond to a frivolous and unsupported motion. Attorneys' fees are awarded to [Monita] in the amount of $4,225.00 payable forthwith."

5. *Alan's unsuccessful motion for reconsideration*.

Alan moved for reconsideration, taking issue with the trial court's ruling that one of the cases he cited was distinguishable.

Monita opposed reconsideration and requested attorney fees and costs of $1,816 for having to respond to a frivolous motion.

The trial court granted reconsideration After reconsidering the matter, it found no basis to modify the February 26, 2003 order, granted Monita's request for sanctions and ordered Alan to pay $918 to Monita's counsel.

Alan filed a timely notice of appeal from the February 26, 2003 order denying his motion to "correct" the 1998 order, and from the subsequent sanctions order.

CONTENTIONS

Alan contends the trial court erred in refusing to correct the 1998 order and the sanctions order should also be reversed.

DISCUSSION

1. *General principles: trial court's inherent power to correct clerical error in judgment.*

The signing "of a judgment, which does not express the actual judicial intention of the court, is clerical rather than judicial error." (*Conservatorship of Tobias* (1989) 208 Cal.App.3d 1031, 1035.)

As this court noted in *Ames v. Paley* (2001) 89 Cal.App.4th 668, " 'A court of general jurisdiction has the power, after final judgment, and regardless of lapse of time, to correct clerical errors or misprisions in its records, whether made by the clerk, counsel or the court itself, so that the records will conform to and speak the truth. [Citations.]' (7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 69, p. 597.) This inherent power is confirmed by statute. [Code of Civil Procedure] [s]ection 473, subd. (d) states: 'The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed.' (See 7 Witkin, *supra*, § 69, p. 597.)" (*Ames v. Paley, supra,* at pp. 672-673.)

Hansen v. Hansen (1949) 93 Cal.App.2d 568 is illustrative. There, the trial court orally ruled that spousal support would terminate upon wife's remarriage, but that term was omitted from the interlocutory divorce judgment. (*Id*. at pp. 568-569.) The husband moved to modify the decree by adding the omitted term. (*Id*. at p. 569.) In upholding the trial court's modification order, *Hansen* stated: "While a court may not correct a judicial error by a *nunc pro tunc* order more than six months after its entry, it may so correct a clerical error." (*Id*. at p. 570.)

2. *Standard of appellate review.*

"Whether the error was clerical in nature is a matter for the trial court to determine. [Citations.] Great weight should be placed on the trial court's declaration as to its intention in signing the judgment as the nature of the error is seldom clear from the record or other extrinsic evidence. [Citation.]" (*Conservatorship of Tobias, supra*, 208 Cal.App.3d at p. 1035.)

In accordance with the substantial evidence rule, a trial court's finding as to the presence or absence of clerical error, based upon conflicting evidence, is conclusive upon the reviewing court. (*Bastajian v. Brown* (1941) 19 Cal.2d 209, 215.)

3. *Trial court properly rejected Alan's claim that the bonus provision in the underlying order was the product of clerical error.*

There is abundant evidence in the record supporting the trial court's rejection of Alan's claim that the bonus provision in the underlying order was the product of clerical error.

As indicated, before the trial court signed the underlying order, it was reviewed by Alan, an attorney acting in propria persona. The order was three pages long, double spaced. The bonus provision, awarding Monita 40 percent of Alan's bonus income, was set forth in a discrete paragraph, paragraph 14(e). Alan reviewed the order drafted by Taback and signed it, approving it "as to form."

Four years later, in seeking to correct the alleged clerical error in the order, Alan did not file a *moving* declaration to explain why he approved the order or how he could have overlooked the bonus provision therein. As the trial court herein observed, Alan's "failure to support his motion [to correct the prior order] with a declaration under penalty of perjury suggests disingenuousness on his part."

Alan later filed a *reply* declaration stating he signed the order prepared by opposing counsel because he was not representing himself at the time "and assumed that it was a mere formality that the document was sent to [him]." Given Alan's education and legal background, it is not surprising that the trial court was not impressed with Alan's explanation for signing the order. Further, although Alan contends he was then represented by counsel, the order on its face indicates Alan approved it as an attorney "In Pro Per."

Further, the record is at odds with Alan's contention that the bonus provision in the 1998 order came out of thin air. As indicated, between the date of the hearing on the OSC and the date Alan approved the order, he consulted with attorney Fleishman, a family law specialist. Shortly after the hearing on the OSC, Alan faxed Fleishman a memorandum wherein he stated: "*As far as bonuses go, since I have to do over $433,000 per year to even get them, it is quite unlikely that [t]here will be any. Also, I still am not bringing many of my own cases so any bonuses in this area is speculation. . . .* I want a waiver of all support, as well as my having to carry her as a beneficiary on my life insurance for $250,000."[4] In other words, after the hearing on the OSC to modify support, Alan told Fleishman that he was not concerned about a provision relating to bonus income because he wasn't generating enough business to earn any bonuses.

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[4] The memo to Fleishman thus reflects that between the OSC hearing and the date of the formal order, the parties were negotiating the final terms of the order.

The Fleishman memorandum supports the inference that the issue of bonuses was addressed during the OSC proceedings, presumably in chambers and not reported. The Fleishman memorandum defeats Alan's claim that the bonus provision in the order came about due to a clerical error, and supports the trial court's decision denying Alan's motion to "correct" the prior order.

In view of the above, it is unnecessary to address the additional reasons the trial court gave for denying Alan's motion.

4. *No merit to Alan's challenge to sanctions award.*

Alan complains the trial court sanctioned him $4,225 for bringing the motion to "correct" the 1998 order and $918 for bringing the motion for reconsideration.

There was no sanctions award of $4,225. In denying Alan's motion to "correct" the prior order, the trial court ruled "[Monita] is entitled to an award of attorney's fees for having to respond to a frivolous and unsupported motion. Attorneys' fees are awarded to [Monita] in the amount of $4,225.00 payable forthwith." Irrespective of the trial court's characterizing Alan's motion as frivolous, the award of attorney fees to Monita was not an imposition of sanctions. The attorney fees incurred by Monita in resisting Alan's motion to "correct" the 1998 order were recoverable under Family Code section 2030, subdivision (c), which provides: "For services rendered or costs incurred after entry of judgment, the court may award the attorney's fees and costs reasonably necessary to maintain or defend any subsequent proceeding . . . ." We perceive no abuse of discretion in the trial court's award to Monita of $4,225 in attorney fees for the expense she incurred in resisting Alan's meritless motion to "correct" the 1998 order.

Thereafter, Alan moved for reconsideration. In finding no basis to modify the February 26, 2003 order, the trial court sanctioned Alan in the sum of $918. Alan's opening brief does not explain why said order was an abuse of discretion, and on this record, we perceive no error in the trial court's ruling.

DISPOSITION

The order denying Alan's motion to "correct" the 1998 order is affirmed. The attorney fee orders are also affirmed. Monita shall recover costs on appeal, as well as attorney fees she incurred in responding to this appeal. (Fam. Code § 2030, subd. (c).)

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KLEIN, P.J.

We concur:

CROSKEY, J.

ALDRICH, J.